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in the
Supreme Court
of the
United States

OCTOBER TERM 1974

NO. _____

DENNIS EVANS INGHAM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, DENNIS EVANS INGHAM, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 24, 1974.

OPINION BELOW

The Opinion of the Court of Appeals reported at 502 F.2d 1287 (1974) appears in the appendix hereto. The Judgment of the United States District Court for the Southern District of Florida appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 24, 1974. A timely petition for rehearing en banc was denied on December 23, 1974, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the right of customs agents to make a warrantless border search can be extended to vessels already inside the United States upon mere suspicion that vessel has recently arrived.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourth Amendment:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

On December 13, 1971, Petitioner, using the name Dennis Kaufman, purchased the 42 Foot M/V Nurmi for $55,000.00 cash. A co-defendant, Steven McCarthy, on December 22, 1971, entered into a rental agreement for the lease of a house located at 240 Golden Beach Drive, Golden Beach, Florida. This lease was to cover January 1, 1972 to April 30, 1972.

Customs agent William Norsworthy testified that he had first received information concerning M/V Nurmi on January 8, 1972, at which time he initiated a search to ascertain where the vessel was berthed.

On January 11, 1972 and January 12, 1972 the boat was located at the dock behind 240 Golden Beach Drive.

On January 25, 1972, the M/V Nurmi, with Petitioner on board was sighted in Colombia.

On February 6, 1972, Agent Lynch observed the vessel in Bahamian waters at 1:00 P.M. and at 2:30 P.M.

Later on February 6, 1972 other agents observed the M/V Nurmi in local waters as it approached the dock at 240 Golden Beach Drive.

At approximately 8:05 P.M. Agents boarded and searched the boat finding 4,000 pounds of marijuana in the aft cabin.

Petitioner was found guilty of conspiracy to import marijuana into the United States, importation of mari-

juana and possession with intent to distribute. Petitioner was sentenced to five years on each count to run concurrently.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS REGARDING EXTENDED BORDER SEARCHES WITHOUT PROBABLE CAUSE.

In the case of **Almeida-Sanchez v. U.S.**, 413 U.S. 266, 37 L.Ed.2d 596, 93 S.Ct. 2535 (1973) this Court condemned roving patrol searches by border patrol agents on a State Highway which was at all points at least 20 miles north of the Mexican border stating that in the absence of probable cause or consent that search violated petitioner's right to be free of "unreasonable searches and seizures".

In the instant case the vessel in question was observed outside the United States and then later observed to approach and dock behind the co-defendant's house.

The record is devoid of any testimony as to probable cause for the search. The time between the sighting outside the United States and the one inside, some five hours, would have permitted one or more stops within the United States prior to the landing where the search and arrest took place.

The vessel in question was never seen crossing the border nor was it stopped or boarded by the Coast Guard or Customs Agents as it travelled in Florida waters prior to docking.

The search in the instant case was not a fixed check point border search, but was more similar to the roving patrol search in **Almeida-Sanchez,** supra.

In **Bowen v. U.S.,** 413 U.S. 915, 37 L.Ed.2d 1038, 93 S.Ct. 3069 this Court granted the petition for certiorari vacating the opinion of the Ninth Circuit **Bowen v. U.S.,** 462 F.2d 347 and remanded the case for further consideration in light of **Almeida-Sanchez.**

The **Bowen** case involved a fixed check point search **Bowen v. U.S.,** 500 F.2d 960 (1974) and the Court's decision has direct bearing on the facts in the instant case and is in direct conflict with it.

In **Bowen,** the defendant was stopped at a fixed checkpoint 49 miles from the border. The Court held:

> "We hold here that under the rule announced by the Supreme Court in Almeida-Sanchez the search of Bowen's camper truck violated the Fourth Amendment because the search was not the functional equivalent of a border search and was authorized neither by warrant nor by probable cause."

In **Bowen** supra, the Court also referred to two lines of cases prior to **Almeida-Sanchez.**

The first is typified by **Alexander v. U.S.,** 362 F.2d 379 (9th Cir.) cert. den. 385 U.S. 977, 87 S.Ct. 519, 17 L.Ed.2d, 439 (1966) where customs officials acting upon a tip from an informer, placed the defendant's vehicle under surveillance when it crossed the border, and kept it under

almost continuous watch as it made suspicious movements through the streets of a border city, in upholding the subsequent search as a border search the Court stated:

> "Where . . . a search for contraband by customs officers is not made at or in the immediate vicinity of the point of international border crossing, the legality of the search must be tested by a determination of whether the totality of the surrounding circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, are such as to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of the search was abroad the vehicle at the time of entry into the jurisdiction of the United States." See Also **U. S. v. Mejias,** 452 F.2d 1190, 1192, 1193 (9th Cir. 1971); **U.S. v. Terry,** 446 F.2d 579 (9th Cir.) cert. denied, 404 U.S. 946, 92 S.Ct. 301, 30 L.Ed.2d 261 (1971); **Castillo-Garcia v. U.S.,** 424 F.2d 482, 484, 485 (9th Cir. 1970); **Bloomer v. U.S.,** 409 F.2d 869, 870, 871 (9th Cir. 1969); **Gonzalez-Alonso v. U.S.,** 379 F.2d 347, 349, 350 (9th Cir. 1967); **Rodriquez-Gonzalez v. U.S.,** 378 F.2d 256, 258 (9th Cir. 1967); **Leeks v. U.S.,** 356 F.2d 470, 471 (9th Cir. 1966); **King v. U.S.,** 348 F.2d 814, 816 (9th Cir.), cert. denied, 382 U.S. 926, 86 S.Ct. 314, 15 L.Ed. 2d 339 (1965); **Murgia v. U.S.,** 285 F.2d 14 (9th Cir. 1960), cert denied 366 U.S. 977 81 S.Ct. 1946, 6 L.Ed.2d 1265 (1961), cert. denied, 376 U.S. 946, 84 S.Ct. 803, 11 L.Ed.2d (1964)."

In the second line of cases, the Ninth Circuit treated a search as the equivalent of a border search, where it appeared with reasonable certainty that the vehicle searched contained either goods which had just been smuggled or a person who had just crossed the border illegally **U.S. v. Weil,** 432 F.2d 1320 (9th Cir. 1970) cert. denied., 401 U.S. 947, 91 S.Ct. 933, 28 L.Ed.2d 230 (1971).

In **Bowen,** supra, the Ninth Circuit held that **Almeida-Sanchez** would not be given retroactive effect. The search in the instant case took place in 1972 prior to the Court's decision in **Almeida-Sanchez.**

It is believed that the question of retroactivity of the **Almeida-Sanchez** case is presently before the Court in the cases of **U.S. v. Bowen,** 73-6848, **Ortiz v. U.S.,** 73-2050 and **Brigoni-Ponce v. U.S.,** 74-114. See 42 L.Ed.2d 47.

In the case at bar whichever decision is finally reached as to the retroactive application of **Almeida-Sanchez** the opinion in the Fifth Circuit will still be in conflict with decisions of other Courts of Appeals or this Court.

Assuming arguendo that **Almeida-Sanchez** and its progeny apply the search in the instant case would violate the Fourth Amendment due to the absence of probable cause or a search warrant. If, on the other hand, pre **Almeida-Sanchez** law is applied the opinion in the instant case is in direct conflict with **Alexander v. U.S.,** supra, and the numerous other cases to the same effect.

In the Alexander case, supra, the Ninth Circuit held that to justify as a border search a search removed in time or distance from the border, the Court must consider

"(whether there is) reasonable certainty that any contraband which might be found in or on the vehicle at the time of search was aboard the vehicle at the time of its entry into the jurisdiction of the United States."

The Court in Alexander deemed it crucial that authorities had the vehicle under almost constant surveillance from the time it crossed the border until the time of search. In the instant case, the Court deemed it irrelevant that the vessel was seen at 2:30 near Bimini (Also near the territorial limits of the U.S.) and then not seen again for five hours, until it approached the co-defendant's house.

In the instant case, the Court held that since the vessel was sighted outside the United States and then inside, the border crossing was obvious and a subsequent search regardless of elapsed time or distance would still be a border search.

CONCLUSION

It is respectfully submitted that the opinion of the Fifth Circuit in the case at bar is in direct conflict with the holdings of this Court and of other Circuits and for that reason certiorari should be granted.

Respectfully submitted,

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